PLEADING ESTOPPEL.

I.

NO subject is fraught with more difficulties for the pleader than that of estoppel. The problems of "when" and "how" to plead seem never so perplexing as when they arise in connection with this subject. That these problems are not confined to any day or age is evidenced by the reports from the time of Lord COKE down to the latest advance sheets of the present day reporter systems, and the lawyers of no generation have been wholly agreed on their solution. No system of pleading yet established has been free from these questions and with each general change in system they seem to spring up with their usual, if not added, perplexity. Conceding this to be the situation, one who attacks the subject with the avowed purpose and intention of clearing up all of the difficulties in it, at the outset, convicts himself of inexperience and temerity. It is with no such expectation that the writer has undertaken this article; he does hope, however, to bring the matter before his readers in such a way by the collection of, and some comment on, the authorities, especially the later ones, as to present and in a small way assist in a solution of, some of the problems as they arise today in pleading cases involving estoppel either as a part of the plaintiff's case or as a defense thereto.

As preliminary to taking up the questions of how and when to plead it seems desirable first to consider the definition and classification of the various kinds of estoppel. Lord COKE defined it as follows: "Estoppel cometh of the French word estoupe, from whence the English word stopped; and it is called an estoppel or conclusion because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth."[1] This graphic definition or description conveys a forcible if somewhat misleading idea of estoppel, the real nature of which is shown in less striking terms by the following excellent statement: "An estoppel * * * is an admission, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature—so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it—though he may show that the person relying on it is estopped from setting it up, since that is not to deny its conclusive effect as to himself but to incapacitate the other from taking advantage of it."[2] Estoppels were classified by Lord COKE as

[1] 3 Coke's Institutes, p. 430.
[2] 2Smith's Leading Cases, Ed. 11 (note), p. 744.

estoppel (1) by matter of record, (2) by matter in writing, now generally known as estoppel by deed, and (3) by matter in pais.[3] This classification is still quite generally followed.

There seems to have been different rules at common law as to pleading these various kinds of estoppel. The early English cases which take up the question of the necessity of pleading estoppel are usually cases involving estoppel by matter of record or estoppel by matter in writing, i. e., estoppel by deed. One of the earliest reported cases on this subject is known as *Goddard's case*,[4] decided in the twenty-sixth year of the reign of Queen Elizabeth, 1586-7. This was an action by an administrator on a bond made to his intestate, dated 4 April, 24 Elizabeth. The defendant pleaded that the intestate died before the date of the bond, and so concluded, that the said writing was not his deed, upon which the plaintiff took issue. The jury found specially that the defendant delivered the bond, as his deed, on 30 July, 23 Eilzabeth, in the lifetime of the intestate, bearing date 4 April, 24 Elizabeth, before which date the intestate died; the court gave judgment for the plaintiff. In his report of this case Lord COKE said: "The reason of this judgment was, that although the obligee in pleading cannot allege the delivery before the date as it was adjudged in 12 Hen. 6, 1, which case was affirmed to be good law, because he is estopped to take an averment against anything expressed in the deed, yet the jurors, who are sworn to say the truth, shall not be estopped, for an estoppel is to conclude one to say the truth and therefore jurors cannot be estopped, because they are sworn to say the truth. * * * But if the estoppel or admittance be within the same record in which the issue is joined, upon which the jurors shall give their verdict, there they cannot find anything against that which the parties have affirmed and admitted of record, although the truth be contrary; for the court may give judgment upon a thing confessed by the parties, and jurors are not to be charged with any such thing, but only with things in which the parties differ."

In order to thoroughly understand the reasons set forth by COKE in his report of this case it must be kept in mind that in the early days of its existence as an institution the jury found a verdict from their own knowledge and they were sworn to speak the truth in answer to a certain question or questions submitted to them.[5] It is probable that in COKE'S time the transition into the modern jury had not gone so far as to alter the oath and the jurors were even

[3] Coke's Institutes, p. 430.

[4] 2 Coke 4.

[5] 1 Pollock & Maitland, History of English Law, p. 117.

Forsyth's History of Trial by Jury, pp. 158-167; 3 Blackstone's Comm., p. 374; 2 Reeves' Hist. Eng. Law, 164; 1 Holdworth's Hist. Eng. Law, 156, 157.

then sworn simply to speak the truth as to a certain issue and not to find a verdict according to the law and evidence as is required today; indeed, this would seem of necessity to be true if Lord COKE's statement of this case is to be taken as correct. The doctrine of *Goddard's* Case was again enunciated in the case of *Speake* v. *Richards*,[6] decided in 1618.

A case[7] in the court of the Queen's Bench decided early in the eighteenth century seems to modify the broad doctrine as it is stated in the foregoing cases. In an action of ejectment the jury found a special verdict stating that in a former proceeding in scire facias against ter-tenants, of which the defendant was one, the writ reciting the judgment of a wrong term, as the record produced in evidence showed, and a plea of nul tiel record being filed and issue joined thereon, judgment was rendered for the plaintiff in the present suit, execution taken on the land in question and the same extended. The defendants in the suit in ejectment sought to take advantage of the variance between the judgment recited in the writ and that given in evidence. The jury submitted to the court the question whether this should be allowed. After mature deliberation the court decided that the defendants were estopped by the judgment in scire facias to say that there was no judgment as recited by the writ, "because that matter had been tried against them, and the defendants were concluded to falsify the judgment in the point tried." In the report of this case it is said: "And the court took this difference, that where the plaintiff's title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel; for here is a title in the plaintiff that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may but takes issue on the fact, the jury shall not be bound by the estoppel, for then they are to find the truth of the fact which is against him. Thus in debt for rent on an indenture of lease, if the defendant plead nil debet, he cannot give in evidence that the plaintiff had nothing in the tenements; because if he had pleaded that specially, the plaintiff might have replied the indenture and estopped him; but if the defendant plead nil habuit, etc., and the plaintiff will not rely on the estoppel, but reply habuit, etc., he waives the estoppel and leaves it at large and the jury shall find the truth notwithstanding his indenture." The doctrine as modified by this case and stated in modern form is that the party, who relies on matter of estoppel, if he has no opportunity to plead it, may show

[6] Hob. 206.

[7] Trevivan v. Lawrance et al. (1705), 1 Salk. 276.

it in evidence, and it will have the same effect as an estoppel as though it were pleaded; but when the matter to which the estoppel applies is directly averred or denied by one party and the opposing party takes issue on the fact instead of pleading the estoppel, he is taken to have waived the estoppel and the jury may find the fact. In the year following the decision of this case the doctrine was still further modified, or explained by the case of *Kemp* v. *Goodal*,[8] which is authority for the proposition that where estoppel appears on the record, as where in an action of debt upon a lease the defendant pleads nil habuit in tenementis, the other party relying thereon may demur. It must be kept in mind that up to this time the cases discussing estoppel have been cases involving estoppel by record or deed only.

Certain cases,[9] decided during the latter half of the eighteenth or in the early part of the nineteenth century, are cited by the editors of SMITH'S LEADING CASES[10] as tending to show that the doctrine announced in *Goddard's Case* was not followed during the century following its decision. An examination of these cases tends to convince one that this conclusion is scarcely warranted by anything appearing in the cases with the possible exception of the statement by DEGREY, C. J., in the *Duchess of Kingston's Case* that "the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties." In the other cases cited it does not appear that the estoppel was not pleaded or that the question of failure to plead it was raised. In the case cited as a possible exception the question of pleading estoppel was not raised and the court made the statement quoted as a general statement of the law of judgments. That the editors of SMITH'S LEADING CASES have mistaken the attitude of the English courts toward the doctrine of *Goddard's Case* during the two centuries or more following its decision is indicated by Lord ELLENBOROUGH'S opinion in the case of *Outram* v. *Morewood*,[11] decided in 1803. In that case facts constituting an estoppel of record were pleaded in the replication. In his opinion the Lord Chief Justice said: "The plea would be conclusive that at the time of pleading the soil and freehold were in the defendant; and if properly pleaded by way of estoppel, it would estop the plaintiff, against whom it was

[8] (1706) 1 Salk. 277. See also to same effect, Palmer v. Ekins (1828), 2 Raym. 1550; Heath v. Vennenden (1695), 3 Lev. 146.

[9] Aslin v. Parkin (1758), 2 Burr. 665; Hitchin v. Campbell (1771-2), 2 W. Bl. 827, 830; The Duchess of Kingston's Case (1776), 20 How. St. Tr. 537; Rex v. Inhabitants of the Parish of St. Pancras (1794), 1 Peake 219; Strutt v. Bovington (1803), 5 Esp. 57.

[10] 11th Ed., Vol. 2, p. 769.

[11] 3 East. 345.

found, from again alleging the contrary. But if not brought forward by plea, as an estoppel, but only offered in evidence, it would be material evidence indeed that the right of freehold was at the time as found; but not conclusive between the parties, as an estoppel would be."

Whatever the authority of *Goddard's Case* may have been until the beginning of the nineteenth century, early in that century, in 1819 to be exact, there was decided the case of *Vooght* v. *Winch,*[12] in which the doctrine of the former case was approved. In the latter case the question of the necessity of pleading a judgment in order to use it as an estoppel was squarely raised and it was expressly decided that in order to operate as an estoppel a former judgment must be pleaded. The court applied the doctrine to the case in hand and the opinion contains no discussion of the modification, offered by some of the earlier cases, of limiting the doctrine to those cases in which in the regular course of pleading the party, seeking to enforce estoppel, has had an opportunity to plead it. Chief Justice ABBOTT in his opinion said: "I am of opinion that the verdict and judgment obtained for the defendant in the former action was not conclusive evidence against the plaintiff upon the plea of not guilty. It would indeed have been conclusive if pleaded in bar to the action by way of estoppel. * * * But the defendant has pleaded not guilty, and has thereby elected to submit his case to a jury. Now if the former verdict was proper to be received in evidence by the learned Judge, its effect must be left to the jury. If it were conclusive, indeed, the learned Judge ought immediately to have nonsuited the plaintiff, or to have told the jury that they were bound in point of law, to find a verdict for the defendant. It appears to me, however, that the party, by not pleading the former judgment in bar, consents that the whole matter shall go to a jury, and leaves it open to them to inquire into the same upon evidence then submitted to them."

It is perhaps unnecessary to trace further the English decisions on the method and rules as to pleading estoppel by matter of record or deed. Yet as certain cases remain which throw additional light on the question of the effect of failure to plead estoppel it may not be unadvisable to refer briefly to them here. I allude to the cases of *Doe* v. *Huddart,*[13] and *Matthew* v. *Osborne.*[14] These were both cases in trespass for mesne profits, and both followed the rule laid down in *Goddard's Case,* and are authority for the proposition that

[12] 2 Barn. & Ald. 662, 21 Rev. Rep. 446.
[13] (1835) 2 C. M. & R. 316.
[14] (1853) 22 L. J. R. (C. P.) 241.

a judgment in ejectment is not conclusive evidence of title in the action for mesne profits, unless it be pleaded by way of estoppel, where the plaintiff has had an opportunity to do so; but the plaintiff having waived the right to plead the judgment as an estoppel may introduce it in evidence, to prove his title though it will not be conclusive for this purpose. As is suggested by the editors of SMITH'S LEADING CASES,[15] it is possible to reconcile all of the cases that have been cited if the language used in the opinions is not considered apart from the facts in connection with which it is used. Those cases in which the broad rule is stated that estoppel must be pleaded in order to constitute a bar will be found to involve a situation where the party seeking to enforce the estoppel had an opportunity to plead it and chose to file another plea. There is nothing in the earlier decisions that conflicts with the doctrine stated in some of the later ones that where the opportunity is present and the party relying on a record or deed as an estoppel fails to plead the same, the record or deed may be offered in evidence, not for the purpose of a bar, but to prove or disprove the fact in question. So it seems proper to say that the rule as fixed by the concurring English authorities is that estoppel by matter of record, or deed, in order to be given in evidence as a bar, must be pleaded by the party relying thereon, if he has the opportunity to do so, but if the opportunity is not furnished in the regular course of pleading, then the evidence of the record or deed may be taken as conclusive. It is true that the statements of the judges in the opinions in one or two of the cases cited if taken in the broadest meaning that might be attributed to them would be in conflict with the rule as above stated, but if only that meaning is given to the words which is necessary to uphold the decisions in those cases there is no conflict. There is nothing in any of the English cases referred to in the foregoing pages that indicates an opinion on the part of the judges that the order or general rules of pleading in cases involving estoppel should be any different than in other cases. In other words, the judges and expounders of the law have never meant to say that one should violate the logical order of pleading for the purpose of setting up an estoppel at all events.

Though Lord COKE mentioned estoppel by matter in pais as one of the divisions or kinds of estoppel, the question of the necessity of pleading it seems not to have arisen in England until comparatively modern times. It may be that this is to be attributed to the adoption of the rules of Hilary Term in 1834. Indeed, this explanation is suggested by a statement of Chief Justice TINDALL, in a case

[15] Ed. 11, Vol. 2, pp. 771-2.

decided in 1842,[16] to the effect that the question of pleading a certain estoppel by matter in pais could not have arisen before the new rules, "as both the defense and the answer to it, might have been matter of evidence only." The most noticeable effect of these rules was the restriction of the defenses that could be offered in evidence under the general issue.[17] Estoppel is scarcely ever an element of the plaintiff's prima facie case, at least not to the plaintiff's knowledge; it occasionally arises as a part of defendant's defense, but by far the most common occcurrence is its appearance as a means, on the part of the plaintiff, of meeting the defendant's defense. Where the defense is such that it can be given in evidence under the general issue, the estoppel is not to be pleaded because the plaintiff cannot be certain that the defense which he would urge to be barred by the matter in estoppel will be made, and of course he cannot plead an estoppel generally to deny the facts set up in his own pleading. This is illustrated by a reference to the action of trespass. The Rules of Hilary Term restricted the general issue in that action so that the plea of not guilty no longer operated as a denial of the plaintiff's possession or right of possession and so if these allegations of the declaration were intended to be challenged by the defendant he was obliged to resort to a common traverse.[18] Suppose the plaintiff in such an action took the position that the defendant by some act of his which had mislead plaintiff was estopped to deny plaintiff's possession or right thereto. Before the Rules of Hilary Term the defense of no possession or right thereto in plaintiff could have been made under the general issue and so until the trial plaintiff could not know whether that defense was to be made and hence would not have pleaded the estoppel. But after the adoption of the said rules in order for defendant to make such a defense he must have filed a common traverse denying these facts and the plaintiff being thus notified of the defense to be made at the trial was in a position to file a replication in estoppel. In order to understand this thoroughly it must be kept in mind that though the general rule of common law pleading is that an issue well tendered must be accepted, and so when a common traverse is pleaded to the declaration the plaintiff as a general rule can do nothing except join issue, yet estoppels form an exception to this general rule[19] and may be pleaded in a case where issue would otherwise be joined. This conclusion seems not unreasonable when the nature of a plea of estoppel

[16] Sanderson et al. v. Collman et al. (1842), 11 L. J. R. (N. S.) C. P. 270.

[17] Martin's Civil Procedure, p. 337.

[18] Rules of Hilary Term, V. 2, under Pleadings in Particular Actions. See 1 Chitty on Pleadings, 16th Am. Ed., p. *756.

[19] Perry, Common Law Pleading, p. 292.

is considered. An estoppel is a bar created by some act or statement of a party, which precludes him in law from making an "allegation or denial of a contrary tenor."[20] It certainly, then, seems logical to say that if in the case where one seeks to bar evidence in proof of an affirmative allegation on the part of his opponent, he must plead the matter constituting the estoppel, it is equally necessary to plead the matter constituting the estoppel where one seeks to bar his opponent from denying a certain fact. Indeed, this conclusion is supported by the comments of the reporter on the case of *Armstrong* v. *Norton*.[21] In this case the question whether a judgment in a former ejectment suit need be pleaded as an estoppel in order to be put in evidence as a bar was raised. During the argument the attorney for the defendant referred to the case of *Doe* v. *Huddart* and intimated that in that case the defendant having filed a plea concluding to the country, there was no opportunity given the plaintiff to reply an estoppel because of the conclusion of the plea. The case went off on another point but the reporter states: "On the following day, Baron Pennefather seeing Mr. Griffith (the attorney for the defendant) in Court made the following observations in reference to the preceding case:—Upon the decision which took place yesterday, as to how far the ejectment was to be considered conclusive in the action for mesne rates—it was contended on the part of the defendant, that it could not be held conclusive unless it were pleaded as an estoppel, and for that proposition the case of *Doe* v. *Huddart* was relied on. In that case there was a plea of the general issue, and a special plea that the premises in question were not the property of the plaintiff, and it was said by Mr. Griffith, that because the latter plea concluded to the country, the plaintiff was precluded from replying the estoppel, but I cannot concur in that proposition, as I am of the opinion that he might have replied the judgment as an estoppel notwithstanding such conclusion of the plea."

The earliest case, taking up the question of pleading estoppel in pais, which the writer has been able to discover, is that of *Sanderson et al.* v. *Collman et al.*,[22] decided April 23, 1842. This was an action of assumpsit by the indorsees of a bill of exchange against the acceptors. The declaration alleged the making and acceptance of the bill by the defendant. To this the defendant filed a plea denying the making of the bill, and the plaintiff filed a replication in estoppel, relying on the fact that the defendants had accepted the bill

[20] Andrews' Stephen's Pleading, p. 280.
[21] (1839) 2 Irish Law Reports 96.
[22] 11 L. J. R. (N. S.) C. P. 270.
See also Phillips v. Im Thurn (1865), 18 C. B. N. S. 400.

to estop them to deny that it was not made by them. To the replication the defendants demurred. Chief Justice TINDALL, in deciding the case, said: "As to the question of pleading the estoppel, there might, perhaps, be some doubt; but I think that the difficulty does not arise in this case, if we see, from the matter alleged in the declaration, that the party would be estopped from putting such a plea on the record, and that the plea is bad as it stands; not, indeed, that I feel any difficulty in saying that I do not see any sufficient ground for holding that such an estoppel might not be well pleaded. * * * If the matter here were only quasi an estoppel, or mere evidence before a jury, the plaintiffs, perhaps, might not be allowed to plead it; but I do not see why the particular objection in this case might not well be raised by pleading." Justice ERSKINE, in the same case, said: "The question then is whether such a defense is pleadable. If the answer to the action on the bill be such as the defendants set up, the new rules oblige them to plead it, and he has done so. The plaintiffs then reply the estoppel, and add the material fact that the party took the bill on the faith of the acceptance; thereby, supplying what might have been said to be wanting on the face of the declaration. * * * But even suppose that the question could have been gone into upon the mere traverse of the acceptance, I yet do not see why the estoppel may not also be relied on in pleading." The report of another case,[23] which was heard later in the same year shows that an estoppel by matter in pais was pleaded in the replication, but the opinion contains no discussion of it and the case is of no particular value except as an indication of what the practice was.

Some six years later another case[24] was decided, which is of considerable importance in the law of estoppel. It involved an action in trover by an assignee in bankruptcy for the conversion by the defendant of the property of the bankrupt before bankruptcy. The defendant pleaded the general issue, that the bankrupt was not possessed and leave and license from the bankrupt. At the trial evidence of certain acts and statements of the bankrupt was introduced for the purpose of estopping the bankrupt and his privies from saying that the goods belonged to the bankrupt. It was urged by the plaintiff that such evidence was improperly introduced as the estoppel had not been pleaded. Concerning this contention Baron PARKE said: "With respect to estoppel in pais, in certain cases there is no doubt they need not be pleaded in order to make them obligatory—for instance, where a man represents another as his agent

[23] Darlington v. Pritchard (1842), 12 L. J. R. (N. S.) C. P. 34.
[24] Freeman et al. v. Cooke (1848), 18 L. J. R. (N. S.) Exch. 114.

in order to procure a person to contract with him as such, and he does contract, the contract binds in the same manner as if he made it himself, and is his contract in point of law; and no form of pleading could leave such a matter at large and enable the jury to treat it as no contract; and the same rule appears to apply to all similar estoppels in pais." The final conclusion which the learned editors of SMITH'S LEADING CASES draw from the cases is that under the old system of pleading at common law it was "optional either to plead specifically the facts out of which the estoppel arises, or to allege or deny, as the case might be, that which those facts concluded the opposite party from denying or alleging, and rely at the trial upon the matter in pais which created the estoppel, as being conclusive evidence of such allegation or denial."[25] This is undoubtedly the conclusion that is warranted by the language used by the judges in the foregoing cases. It does, however, seem opposed to the spirit and all the rules of pleading to say that one, as he chooses, may or may not plead a certain plea and the result to his case will be the same whether he does or not. To those who have regarded common law pleading as a scientific and logical system a rule of this sort comes as a great surprise. If this is the rule, who will now longer venture to assert that "special pleading is the logic of the law"?

It will be well now to direct our attention to a consideration of the American cases on this subject. Since there are in this country two systems of pleading, the common law and code systems, and since the statutes establishing the code system in the various states contain a clause which, as authorities on pleading and courts generally agree, serves to change the common law rules as to pleading estoppel, the cases under these two systems should be considered separately. Following the chronological order the cases under the common law system should be studied first. It would be natural to expect to find these following more or less closely the doctrine of the English cases which we have just considered. As is suggested by Mr. Smith in his note to the *Duchess of Kingston's Case,*[26] the reason for the doctrine of *Goddard's Case,* if it ever did exist, at least, is not now present, since jurors are now sworn to find the facts according to the evidence, and as the effect of an estoppel, if enforced, whether pleaded or not would be to keep evidence away from the jury, the jurors could not keep their oath and still find against a good estoppel. So the reason for the decision having disappeared we may expect to find that it has had some effect in leading the courts, where the common law system of pleading is still in

[25] 2 Smith's Leading Cases, Ed. 11, 831.
[26] 2 Smith's Leading Cases, Ed. 11, 768.

vogue, to disregard the authority of this celebrated case and that of the great number of later English cases which refer to *Goddard's Case* as a precedent. It is said, in fact, by Mr. Bigelow in his work on Estoppel[27] that "the tendency of the decisions has been strongly the other way (i. e., opposed to the necessity of pleading estoppel), since Mr. Smith's work was published, especially in America." If the courts take this view and allow the admission of evidence of estoppels which are not pleaded, the jury under the modern form of oath cannot disregard the evidence, and, granting that it is sufficient, must find an estoppel to exist even though it is not pleaded.

In the cases involving technical estoppel the rule of *Goddard's Case* as altered by the later English cases, i. e., that estoppel by matter of record or deed, in order to be given in evidence as a bar, must be pleaded by the party relying thereon if he has the opportunity to do so, but if the opportunity does not present itself in the regular course of pleading, then the evidence of the record or deed may be received and taken as conclusive, is quite generally followed.[28] Of course, the cases are not uniform, and several courts have taken the view that technical estoppel need not be pleaded even though

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[27] Bigelow, Estoppel, Ed. 5, 698.

[28] **Illinois**—Smith v. Whitaker (1849), 11 Ill. 417; Leeper v. Hersman (1871), 58 Ill. 218, (estoppel was pleaded in this case but the question of the necessity of so doing was not discussed); Campbell v. Goodall (1881), 8 Ill. App. 266, (this case is to the effect that it is not necessary to plead technical estoppel where opportunity to do so is not given in the regular course of pleading); Mann v. Oberne (1884), 15 Ill. App. 35, 39.

Massachusetts—Howard v. Mitchell (1817), 14 Mass. 241; Eastman v. Cooper (1834), 15 Pick. 276 (estoppel was specially pleaded in this case though the court does not discuss the necessity or advisability of so doing); Gilbert v. Thompson (1852), 9 Cush. 348 (this case, while holding that under the system of pleading, established by the statute of 1836, of trying all questions under the general issue estoppel need not be specially pleaded, indicates that any matter of estoppel relied on should be set out in the specification of defense); Adams v. Barnes (1821), 17 Mass. 364.

New Hampshire—Towns v. Nims (1830), 5 N. H. 259. (This case does not make exceptions of those instances where the opportunity to plead estoppel is wanting, but as no reason for this distinction appeared in the facts of the case, it is certainly no authority against the exception).

New York—Davis v. Tyler (1821), 18 Johns. 490, 492; Wright v. Butler (1830), 6 Wend. 284; Daws v. McMichael (1836), 6 Paige 139, 145; Wood v. Jackson (1837), 18 Wend. 107, 117; Miller v. Manice (1843), 6 Hill 114, 125; Kingsland v. Spaulding (1848), 3 Barb. Chanc. 341.

Kentucky—Burdit's Exrs. v. Burdit & Tatum (1819), 2 A. K. Marsh 143; Keel v. Ogden (1835), 3 Dana 103. (Code of Kentucky was not adopted until 1851).

Pennsylvania—Lang v. Lang (1836), 5 Watts 102; Kilheffer v. Herr (1828), 17 Serg. & Rawle 319. (This latter case acknowledges the general rule as stated above but holds that in the action of debt, assumpsit, etc., in Pennsylvania, where special pleadings are not required, estoppel of record is conclusive in evidence even though not pleaded).

United States—Insurance Company v. Harris (1877), 97 U. S .331.

Vermont—Lord v. Bigelow (1836), 8 Vt. 445, 461; Brinsmaid v. Mayo (1837), 9 Vt. 31; Isaacs v. Clark (1839), 12 Vt. 692; Gray v. Pingry (1845), 17 Vt. 419, 424.

Virginia—Carrol County v. Collier (1872), 22 Gratt. 302.

opportunity to do so is present.[29] In some instances cases which at first glance seem opposed to the general rule above stated may be explained as depending on statutes providing for the general issue as the only plea in bar and that all matters of law or of fact in defense of any civil action may be given thereunder,[30] though it may be that the courts, mistaking the true nature of a plea of estoppel—it is not technically a plea in bar, though for the sake of convenience generally so classified—have unnecessarily regarded this statute as affecting it. There are still other cases in which because of the peculiar nature of the plea of general issue in certain actions, ejectment for example, [31] the estoppel is not required to be pleaded but is treated as conclusive in evidence. This is generally traceable to some peculiar statute of the state or states in the reports of which such decisions are found.[32] The reason for insisting strictly on the necessity of pleading technical estoppel unless the party seeking to introduce it has no opportunity to plead it has frequently been stated to be that estoppels are odious and not to be favored by the law because they shut out the truth. This reason is commented on and disapproved, as regards estoppels of record, very justly, it seems, by Judge REDFIELD in his opinion in *Gray* v. *Pingry*,[33] in which he said, "I profess myself utterly opposed to the reason, which has been handed down to us for requiring this strictness of pleading in regard to estoppels of record, that is, that 'estoppels are odious,' 'not to be favored,' 'because they shut out the truth.' This last clause seems to contain the pith of the whole matter, the hinge upon which all odium turns,—'because they shut out the truth!' If it were said that they shut out litigation, or controversy about truth, I could comprehend the force of the maxim, but by what specie of logic is it

[29] **Maryland**—Beall v. Pearre (1858), 12 Md. 550, 564; Shafer v. Stonebraker (1832), 4 G. & J. 345; Brooke v. Gregg (1899), 89 Md. 234, 237.

Tennessee—Warwick v. Underwood (1859), 3 Head 237; Renkert v. Elliott (1883), 11 Lea 235, 250; Foulkes v. State (1884), 14 Lea 14. It may be that in these cases the judges meant to say no more than that where a party to a case has no opportunity to plead estoppel, it will be conclusive in evidence. The statement of principle that a former judgment is conclusive as a bar if pleaded or offered in evidence is absolute and unqualified, however, and one is led to the conclusion that the courts of Tennessee do not require estoppel to be pleaded in law cases even where the opportunity presents itself. This conclusion is strengthened by the case of Turley v. Turley (1886), 85 Tenn. 251, 260.

[30] Foye v. Patch (1882), 132 Mass. 105; Gilbert v. Thompson (1852), 9 Cush. 348.

[31] Wood v. Jackson (1831), 8 Wend. 9; Black v. Ticker (1866), 52 Pa. St. 436; Phillips v. Crist (1907), 33 Pa. Super. Ct. 445; but see Finley v. Haubest (1858), 30 Pa. St. 190, Young v. Black (1813), 7 Cranch 565, and Kilheffer v. Herr (1828), 17 Serg. & Rawle 319, where the same rule is held to apply to the general issue in debt and assumpsit.

[32] Black v. Ticker (1866), 52 Pa. St. 436; Phillips v. Crist (1907), 33 Pa. Super. Ct. 445.

[33] 17 Vt. 419.

made to appear that a second contestation of the same matter, after the lapse of considerable time, and the uncertainty which time always brings, more or less, upon all past transactions, is to be made more sure of resulting in the truth, is quite beyond my comprehension. I hold that the entire doctrine of the conclusiveness of former adjudications, not only as to the merits of the controversy, but as to all facts distinctly put in issue, and found by a tribunal of competent authority, instead of being an odious doctrine, is one of the most salutary and conservative doctrines of the law."

The rule that estoppel should be pleaded where it can be done in the regular order of pleading is not generally applied when the estoppel is by matter in pais. As hereinbefore stated the English rule in cases involving estoppel by matter in pais seems to be that such matter may, but need not, be pleaded in order to be produced in evidence as conclusive on the point for which it is offered. This rule, illogical as it is when the science of pleading is considered as a whole, has been followed exactly by the law courts of Illinois.[34] The courts of Michigan have adopted the rule that in law cases it is not necessary to plead estoppel by matter in pais.[35] The practical result of the rules of both of these states would seem to be that in actions at law equitable estoppel would never be pleaded. As in both of these states the use of the general issue with notice of special matter of defense is allowed, the question naturally arises, do statements that estoppel need not be specially pleaded imply that no special notice of it need be given in order to prove it under the general issue? This implication seems to be necessary, especially in Michigan, where special pleading has been abolished since 1846,[36] if the courts of this state take the usual untechnical view and regard the plea of estoppel as a plea in bar. At least one Michigan case bears

[34] German Fire Insurance Co. v. Grunert, (1884), 112 Ill. 68, 75; Mann v. Oberne (1884), 15 Ill. App. 35, 38; Campbell v. Goodall (1894), 54 Ill. App. 24, 27; Evans v. Howell (1904), 211 Ill. 85, 93; Dickson v. New York Biscuit Co. (1904), 211 Ill. 468; Gray v. Merchants' Insurance Co. (1906), 125 Ill. App. 370, 375; Roraster v. Peoria Life Ass'n (1909), 149 Ill. App. 536, 538. This doctrine in Illinois is probably influenced by the Practice Act of 1874, which allows the defendant to plead "as many matters of fact in general pleas as he may deem necessary for his defense or may plead the general issue and give notice, in writing, under the same of the special matter intended to be relied on for a defense at the trial." This statute, however, should not be taken to sanction pleading specially defenses which could be introduced under the general issue at common law, as the evident intent of the legislature was to allow the defendant to choose between the common law system of pleading and the simple and less technical system by general issue, giving notice of those matters which under the common law system would have had to have been set up by special plea.

[35] Rogers, Adm'r v. Robinson (1895), 104 Mich. 329, 336; Dean v. Crall (1894), 98 Mich. 591; Mowers v. Evers (1898), 117 Mich. 93; Renackowsky v. Board of Water Com'rs (1900), 122 Mich. 613, 615.

[36] § 10, 071 Mich. C. L. 1897; Chap. 99, § 72, Rev. Stat. Mich., 1846.

out this conclusion,[37] and though another and earlier case[38] takes a view directly opposed to this, it may be explained as belonging to that class of Michigan cases, decided before 1894, which held that estoppel by matter in pais must be pleaded.[39] In other states it has been held that in actions at law equitable estoppel should not be pleaded,[40] and in one state, at least, it has been held that in order to be conclusive in evidence, such an estoppel must be pleaded where the matter against which it is to operate appears on the record.[41]

Although, by the unquestioned weight of authority, in the so-called "common law" states in this country it is not necessary to plead equitable estoppel in actions at law, it is necessary to plead it, as well, as estoppel by matter of record or deed, when the proceedings are in a court of equity.[42] The reasons given by the cases for

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[37] Thomas v. Watt (1895), 104 Mich. 201, 206.

[38] Johnson v. Stellwagen (1887), 67 Mich. 11.

[39] Wessels v. Beeman (1891), 87 Mich. 481; Gooding v. Underwood (1891), 89 Mich. 187; Pearson v. Harden (1893), 95 Mich. 360. These cases were expressly overruled on this point of pleading in the case of Dean v. Crall (1894), 98 Mich. 591.

[40] **Connecticut**—Hawley v. Middlebrook (1859), 28 Conn. 527, 536. (The code was not adopted in Connecticut until 1879, so this case, which was decided under the old system of pleading, is cited with the decisions of common law states).

Delaware—Bank v. Wollaston (1839), 3 Harr. 90, 95.

Maryland—Alexander v. Walter (1849), 8 Gill. 239, 251 (quoting from Canal Company v. Hathaway, 8 Wend. 483, on this point, and approving the quotation as a correct statement of the law); Babylon v. Duttera (1899), 89 Md. 444; Albert v. Freas (1906), 103 Md. 583, 591; Shutter Bar Co. v. Zimmerman (1909), 110 Md. 313, 320.

Mississippi—Turnipseed v. Hudson (1874), 50 Miss. 429, 435. Mississippi is what is known as a quasi-code state and the procedure act making it such was passed in 1850; however, the statute making the change is not worded similarly to the statutes of the true code states in the respect of requiring the pleading of the facts constituting the cause of action or defense. This is the portion of the codes that is regarded as changing the common law rule of pleading estoppel, and since it does not appear in that form in the Mississippi statute, this case is cited with the cases from states still retaining the common law system of pleading. It may be well to state here that cases from code states holding that it is not necessary to plead estoppel in pais are good authority for the proposition that such an estoppel should not be pleaded in a state where the common law system of pleading, or an approximation thereto, prevails.

New Hampshire—Chase v. Deming (1860), 42 N. H. 274, 280.

New York—Welland Canal Company v. Hathaway (1832), 8 Wend. 480; People v. Turnpike Co. (1840), 23 Wend. 222, 229.

[41] Davis, Adm'r v. Thomas et al. (1834), 5 Leigh (Va.) 1. See also Sawyer v. Hayt et al. (1803), 2 Tyler (Vt.) 288, 292, and Woodhouse et al. v. Williams et al. (1832), 14 N. C. 508. (The code was not adopted in North Carolina until 1868).

[42] **Illinois**—Potter v. Fitchburg Steam Engine Co. (1903), 110 Ill. App. 430, 456. But see Hoffman v. Burris (1904), 210 Ill. 587, 593, which is authority for the proposition that former adjudication of the question at bar may be considered by a court of equity although not expressly averred in the answer, where the fact of such adjudication fully appears from the bill itself, even though a demurrer to the bill has been withdrawn and answer filed.

Michigan—Moran v. Palmer (1865), 13 Mich. 367; Dale v. Turner (1876), 34 Mich. 405; Connerton v. Millar et al. (1879), 41 Mich.608; Dean v. Crall (1894), 98 Mich. 591.

Tennessee—Turley v. Turley (1886), 85 Tenn. 251, 260; Rhead v. Citizens St. Ry. Co. (1903), 110 Tenn. 316, 330.

this difference are that in equity pleading the rule is that every fact essential to plaintiff's title to maintain the bill and obtain the relief asked must be stated therein and that all matters relied on as a defense must be stated in the answer in order to be availed of for that purpose and evidence relating to matters not stated in the pleadings cannot be made the foundation of a decree.[43] On first consideration, one is inclined to think that these same reasons should apply to pleading in actions at law as well as in actions in courts of chancery. This would be true if pleading were an exact science and the rules thereof had always been formulated with the real objects of pleading, i. e., to reach a narrow issue and to inform the opposing party of it, in view. It will be seen, however, that this has not been the case, and that many defenses have been allowed by the courts to be introduced under the general issue without any notice or special plea, so that often times the plaintiff is not informed of the exact defense he will be required to meet, and therefore it cannot be said that in law courts only those things may be proven which have been pleaded and that evidence relating to matters not stated in the pleadings cannot be made the foundation of a judgment. Looking at it in this light the distinction as to the necessity of pleading estoppel in pais drawn by the courts between actions at law and equity seems to be justified. The rule that in equity, where the practice of replying specially to matters in defense has ceased, estoppel should be set up in the bill by amendment if it is necessary to prove it as a bar to a defense offered illustrates the strict view some of the equity courts take of this matter. The usual method of anticipating such a defense is to introduce the defense in the form of a pretense in the bill and then follow it by matter in reply in the shape of a charge.[44]

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[To be concluded.]

[43] Rhead v. Citizens St. Ry. Co. (1903), 110 Tenn. 316, 330; Connerton v. Millar et al. (1879), 41 Mich. 608, 612; Moran v. Palmer (1865), 13 Mich. 367; Potter v. Fitchburg Steam Engine Co. (1903), 110 Ill. App. 430, 456.

See also Story, Equity Pleading, § 257 and § 647; Daniell's Chancery Pleading and Practice (5th Ed.), § 603 and § 313 et sec.

[44] Connerton v. Millar et al. (1879), 41 Mich. 608, 612.